

1989

# The State of Utah v. Charles Langdon : Brief of Appellant

Utah Court of Appeals

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Paul Van Dam; Utah Attorney General; attorney for Respondent.

James L. Shumate; Attorney for Appellant.

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THE STATE OF UTAH,  
Plaintiff-Respondent,

Case No. 890479-CZ.

Classification Priority 2

BRIEF OF APPELLANT

Appeal from a Memorandum Decision of the Fifth District Court for Iron County, State of Utah, the Honorable Dean H. Conder, Senior District Judge, Presiding, denying the Defendant's Motion to Withdraw No Contest Plea which was previously entered to the offense of Possession of a Controlled Substance with Intent to Distribute for Value, a Second-Degree Felony.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 890479-CA
	)	
CHARLES LANGDON,	)	Classification Priority 2
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from a Memorandum Decision of the Fifth District Court for Iron County, State of Utah, the Honorable Dean E. Conder, Senior District Judge, Presiding, denying the Defendant's Motion to Withdraw No Contest Plea which was previously entered to the offense of Possession of a Controlled Substance with Intent to Distribute for Value, a Second-Degree Felony.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 890479-CA
vs.	)	
	)	
CHARLES LANGDON,	)	
	)	
Defendant-Appellant.	)	

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JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2a-3(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Memorandum Decision of the Fifth District Court denying the Defendant-Appellant's Motion to Withdraw an earlier plea of no contest.

ISSUES PRESENTED ON APPEAL

It is an abuse of the Court's discretion to deny a Motion to Withdraw a Plea of No Contest entered prior to State vs. Sery, 758 P.2d 935 (Utah Court of Appeals, 1988).

DETERMINATIVE STATUTES OR RULES

The cases which are believed to be determinative in this matter are State v. Sery, 758 P.2d 935 (Utah Court of Appeals, 1988), and a prior appeal in State v. Langdon, Court of Appeals Case No. 880370-CA.

NATURE OF THE CASE

This is an appeal from an Order of the Honorable Dean E. Conder, Senior District Judge, denying the Defendant's Motion

to Withdraw no Contest Plea. The Defendant, in a prior appeal in this matter, State v. Charles Langdon, Utah Court of Appeals Case No. 880370-CA, had his conviction affirmed in the Court of Appeals on the grounds that he entered an unconditional no contest plea under the holding of State v. Sery, supra. At a hearing on July 18, 1989, the Defendant's Motion for Leave to Withdraw Guilty Plea was denied and this appeal follows.

#### COURSE OF THE PROCEEDINGS

The Defendant was originally charged with possession of a controlled substance with the intent to distribute for value, a second-degree felony, the substance being cocaine. Prior to the trial setting in the matter, the Defendant filed a Motion to Suppress which was heard by the District Court and denied. The Defendant entered a no contest plea, prior to the Court of Appeals' decision in State v. Sery, supra., with the intent to preserve the issues of the Motion to Suppress on appeal. The Court of Appeals sustained the Defendant's conviction in the case of State v. Charles Langdon, Utah Court of Appeals, Case No. 880370-CA, on the grounds that the Defendant had entered an unconditional no contest plea finding the application of State v. Sery, to constitute a waiver of the Defendant's right to appeal the District Court's ruling on the Motion to Suppress.

The Defendant filed a Petition for Rehearing, and the Petition was denied. However, the Order denying the Petition signed by Judge Bench stated:

It is hereby ordered that the Petition for Rehearing is denied without prejudice to a motion to withdraw the plea directed to the trial court.

DISPOSITION AT TRIAL COURT

When Mr. Langdon made that Motion to the trial court, the Motion was denied.

STATEMENT OF FACTS

The Defendant was driving his 1978 Cadillac from Los Angeles to Omaha, Nebraska, along Interstate 15 on Thursday, March 17, 1988. At approximately 6:30 p.m., the Defendant's vehicle was observed by Trooper Russell Lee of the Utah Highway Patrol to be traveling, apparently with another vehicle, and both vehicles traveling in the neighborhood of 70 miles per hour. Trooper Lee stopped the Defendant's vehicle, but did not stop the other car. Trooper Lee wrote the Defendant a warning citation for speed, and checked his driver's license and registration. Trooper Lee found that the Defendant was not the registered owner. The Defendant informed Trooper Lee that the vehicle was registered in the name of Marvin or Anthony Linnear, one of whom was a step-son, for insurance purposes, and that the Defendant had been buying the car for approximately one and one-half years. The Defendant gave the Trooper a telephone number which could be called in order to confirm the Defendant's authority to have the car. The Highway Patrol dispatcher attempted to call the registered owners in California. While that call was made the Trooper asked the Defendant if he could search the car for weapons or contraband. The Defendant replied, "I don't care. Go



ahead." The Trooper searched the car carefully and found welded to the frame of the car below the trunk and beneath the rear bumper and the gas tank, a black metal box which appeared to be made of channel iron, measuring approximately 3' x 3' x 12". The box was locked with an apparently new padlock. The Trooper claimed that there were no signs of dirt, grime, or road debris on the box or the lock. The dispatcher notified Trooper Lee that she had been called by a person purporting to be Anthony Linnear, who confirmed that the Defendant had a right to be in possession of the vehicle. Both the Defendant and Anthony Linnear denied knowledge of the box, and refused to give consent for the search of the box. The Trooper testified that on the basis of the information available to him, he felt the vehicle was suspicious. Justice of the Peace Margaret Miller was contacted and an audio-taped proceeding was had wherein Trooper Roger Bagley, who had been at the scene with Trooper Lee, was questioned by Chief Deputy Iron County Attorney, Keith F. Oehler. At the conclusion of Trooper Bagley's testimony, Judge Miller found that there was sufficient evidence to support a Search Warrant. However, no Search Warrant was ever executed, and the vehicle was searched without a warrant. Approximately seven ounces of cocaine, roughly 90 percent pure, was recovered from the locked box. The Defendant, in a prior appeal in this matter, State of Utah vs. Charles Langdon, Utah Court of Appeals, Case No. 880370-CA, had his conviction affirmed by the Court of Appeals on the ground that he entered an unconditional no contest

plea under the holding in State vs. Sery, 758 P.2d 935 under the understanding that Mr. Langdon's unconditional no contest plea waived any right to contest the Motion to Suppress earlier made by Mr. Langdon. The undersigned counsel for the Defendant filed a Petition for Rehearing on the matter, and the Petition was denied; but the Order denying the Petition, signed by Judge Russell W. Bench, stated, "It is hereby ordered that the Petition for Rehearing is denied without prejudice to a Motion to Withdraw the Plea directed to the trial court." When Mr. Langdon made that Motion to the trial court to withdraw the no contest plea, his motion was denied.

#### SUMMARY OF ARGUMENT

The trial court abused its discretion in refusing to allow the Defendant to withdraw his previously-entered no contest plea after a change in the case law eliminated the Defendant's ability to raise the search and seizure issue on appeal.

#### ARGUMENT

##### POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS PREVIOUS NO CONTEST PLEA.

The case law in the State of Utah is clear that the decision to allow a Defendant to withdraw a guilty or no contest plea is within the discretion of the trial court. State v. Forsyth, 560 P.2d 337 (Utah 1977), State v. Yeck, 566 P.2d 1249 (Utah 1977), and State v. Vasilacopulos, 756 P.2d 92 (Utah

App. 1989) In these cases just cited, the Defendants had all entered pleas of guilty rather than pleas of no contest as was the case in this matter. In the case at bar, the Defendant entered a plea of no contest with the specific intent of preserving the search and seizure issue previously ruled upon by the trial court for a review by the Court of Appeals. In the Vasilacopulos case, supra., this court ruled that the record in that case did not affirmatively establish the Defendant's full knowledge and understanding of the consequences of his plea under rule 11(e)5 of the Utah Rules of Criminal Procedure and that the Defendant had satisfied a burden of showing good cause under 77-13-6, Utah Code Annotated, 1953, as amended, to allow him to withdraw his guilty plea. In the instant case, the clear direction of Judge Bench's Order denying the Petition for Rehearing was to have the trial court seriously consider a Motion to Withdraw the previously entered unconditional no contest plea. The good cause shown by Mr. Langdon in the matter now before the Court is that fact that his earlier unconditional no contest plea, entered prior to the Sery decision was intended to preserve the search and seizure issue for appeal.

As is set forth in the Petition for Rehearing in the prior case, as well as the Affidavit of James L. Shumate in Support of Motion to Allow Defendant to Withdraw the No Contest Plea submitted to the trial court on the Motion, a copy of which is included herewith in the Addendum, the Defendant entered the earlier no contest plea upon the advice of counsel with the

specific intention of preserving his right to appeal the court's ruling on the legality of the search of the Defendant's vehicle. As was pointed out in the earlier Petition for Rehearing, the Defendant entered this plea prior to the issuance of this Court's ruling in State v. Sery.

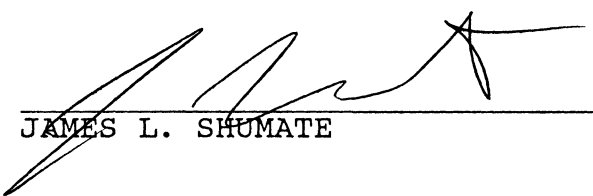
The writer of this Brief, who was also counsel for the Appellant in State v. Sierra, 754 P.2d 972 (Utah App. 1988), followed the same procedure in Mr. Langdon's case as had been used in Mr. Sierra's matter. After the District Court entered a ruling denying the Motion to Suppress, the Defendant entered a plea of no contest with the specific intention to raise the ruling on appeal. Unfortunately for this defendant, the case of State v. Sery, was decided and ruled upon following his entry of a no contest plea. The substantial issue in this case is the legality of the search of the Defendant's vehicle, but because of the decision in State v. Sery, and the Court's earlier ruling in the prior case in Petition for Rehearing, this Defendant has been precluded, through no fault of his own, in bringing that issue to the attention of the Court.

#### CONCLUSION

For the above cited reasons the Defendant should be allowed to withdraw his unconditional no contest plea and enter either a conditional no contest plea as articulated in State v. Sery, supra., or have the case set for trial in order to

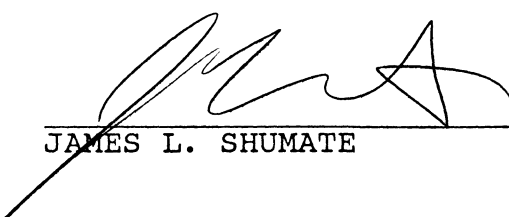
preserve the search and seizure issues earlier presented to the Court.

DATED this 30 day of November, 1989.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Paul Van Dam, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 1<sup>st</sup> day of <sup>O.C.C.</sup>~~November~~, 1989, first class postage fully prepaid.

  
\_\_\_\_\_  
JAMES L. SHUMATE

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
IRON COUNTY, CEDAR CITY DEPARTMENT

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STATE OF UTAH,	)	
	)	AFFIDAVIT OF JAMES L. SHUMATE
Plaintiff,	)	IN SUPPORT OF MOTION TO ALLOW
	)	DEFENDANT TO WITHDRAW THE
vs.	)	NO CONTEST PLEA
	)	
CHARLES LANGDON,	)	
	)	Case No. 1187
Defendant.	)	

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STATE OF UTAH            )  
                              :ss.  
COUNTY OF IRON        )

JAMES L. SHUMATE being first duly sworn deposes and  
says:

1. I am an attorney licensed to practice law in the  
State of Utah, maintaining my office in Cedar City, Utah, and the  
holder of a contract for provision of Public Defender services to  
Iron County for the year 1988.

2. In the spring of 1988, I was appointed to represent  
the above-named Defendant, Charles Langdon, and represented him  
in his preliminary hearing as well as the arraignment and the  
Motion to Suppress Hearing in this case. Following the court's  
ruling on Mr. Langdon's Motion to Suppress, Mr. Langdon, myself,  
and Mr. Bradley Rich, an attorney from Salt Lake City who had

been retained by Mr. Langdon's family, discussed the options available to Mr. Langdon. In that consultation, Mr. Rich, Mr. Langdon, and myself determined that Mr. Langdon would be able to preserve his right to contest the court's ruling in the Motion to Suppress by entry of a no-contest plea in order to allow the Utah Court of Appeals to review that matter. Mr. Langdon entered a no-contest plea in this case on June 3, 1988, and was sentenced to the Utah State Prison forthwith. A Notice of Appeal was filed in this matter, and the Utah Court of Appeals reviewed the case. However, the Utah Court of Appeals refused to review the issues raised by the District Court's ruling on the Motion to Suppress ruling under the rationale of State v. Sery, 758 P.2d 935, that Mr. Langdon's unconditional no-contest plea waived any rights to contest the Motion to Suppress ruling.

In a petition for re-hearing, the undersigned affiant represented to the Court of Appeals that Mr. Langdon's entry of plea was done prior to the decision of State v. Sery. In denying the Petition for Re-Hearing, the Court specifically remanded the matter to the District Court for a Motion to Withdraw Plea. A copy of the Petition for Re-Hearing and a copy of the order of the Court of Appeals denying the petition for re-hearing is attached hereto and incorporated herein by reference. The undersigned hereby represents to the Court that Mr. Langdon at no time wished to waive his right to appeal, and under the state of the law prior to State v. Sery, I was under the impression, as

his counsel, that the entry of a no-contest plea would still preserve that right for appeal.

DATED this 11 day of June, 1989.

JAMES L. SHUMATE

STATE OF UTAH     )  
                              : ss.  
COUNTY OF IRON    )

SUBSCRIBED AND SWORN TO before me this 14th day of June, 1989.

Donna Christensen  
NOTARY PUBLIC

Residing at: Cedar City, Utah

My Commission Expires: 11-7-92

**DONNA CHRISTENSEN**

Notary Public, State of Utah

110 N. Main

Cedar City, Utah 84720

My Commission Expires Nov. 7, 1992

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing AFFIDAVIT OF JAMES L. SHUMATE IN SUPPORT OF MOTION TO ALLOW DEFENDANT TO WITHDRAW NO CONTEST PLEA to Mr. Scott M. Burns, Iron County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 14th day of June, 1989, first class postage fully prepaid.

Karen Chandler  
Secretary